

THE ROLE OF THE GOVERNMENT IN CONSUMER PROTECTION: THE CONSUMER FRAUDS AND CRIMES SECTION OF THE OFFICE OF THE OHIO ATTORNEY GENERAL

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That government should have a major role to play in the protection of the consumer is a comparatively new idea. The trend toward increased governmental intervention between buyer and seller is the result not of visionary political idealism, but rather of fundamental factors currently at work in the economic marketplace. In an economy that places great emphasis on technological innovation and complexity, and given the subtle sophistication of modern advertising, the consumer has lost much of the equality of bargaining position vis-à-vis the seller he once had. The role of government should be to insure a balance between buyer and seller in the marketplace. Only if there is a fundamental equality of bargaining position between buyer and seller can there be the efficient allocation of resources necessary for the operation of a free enterprise economy. Hence, the goal of government in the protection of the consumer is not to regulate the legitimate businessman, but to ensure that he alone reaps the deserved benefits of his enterprise.

I. ORGANIZATION AND DEVELOPMENT OF THE CONSUMER FRAUDS AND CRIMES SECTION

There is no specific statutory enabling authority for the Consumer Frauds and Crimes Section of the Office of the Ohio Attorney General. Rather, it operates under the attorney general's statutory power to act as "chief law officer for the state and all its departments."¹ The lack of specific authority has not been a hindrance to the present development of the Section.²

The staff of the Section consists of a Chief,³ who is directly

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¹ OHIO REV. CODE ANN. § 109.02 (Page 1962).

² Note, however, that discussions on the federal level in the House of Representatives have brought about the possibility that only state created agencies may receive federal grants-in-aid for state consumer protection programs.

³ Currently Colonel George Mingle, whose previous experience includes Superintendent of the Ohio State Highway Patrol and City Manager of Portsmouth, Ohio and Delray Beach, Florida.

responsible to the First Assistant Attorney General, two lawyers, three investigators, and administrative personnel. The section uses other lawyers within the office when they are needed.

All activity is centralized in the Attorney General's Columbus office. While field offices enable a state agency to reach a greater number of local problems, they also cause a separation of the limited resources available. The tendency may be to deal with immediate local problems, and consequently concern with long range problems is diminished. In short, decentralization can lead to an inability to see the forest for the trees.⁴ The Federal Trade Commission, with its nationwide scope of operations, has found the need to create eleven regional offices.⁵ In Ohio, however, decentralization does not become a necessary goal, since an investigator can be in any part of the State within several hours. Added to this is the state's built-in form of decentralization—the local governmental authorities. A prerequisite of effective enforcement is the willingness of local authorities to bring problems to the immediate attention of the Attorney General's office. Since the Section has no statutory enforcement powers, and because under existing law the attorney general has few powers that relate directly to consumer protection, the Section is largely dependent on these other governmental authorities for enforcement when legal action is appropriate.

II. COORDINATION WITH GOVERNMENTAL AND PRIVATE ORGANIZATIONS

A central purpose of the Consumer Frauds and Crimes Section is to coordinate the exchange of consumer information with other governmental and private organizations. This relationship is reciprocal. The Section seeks to help keep local prosecutors and police abreast of legal developments, fraudulent schemes, and operators who may be working in areas of local responsibility. On the other hand, local authorities inform the Section about fraudulent operations on a statewide level. The information coming in to the Section is then relayed to other officials throughout the state.

The Better Business Bureaus and other state consumer agencies are also invaluable sources of information about deceptive business practices. Other agencies of the State of Ohio are directly involved in consumer protection programs relating to food, drugs, insurance,

⁴ But see O'Connell, *Consumer Protection in the State of Washington*, 39 *STATE GOV'T* 230, 235-37 (1966).

⁵ Annual Report of the Federal Trade Commission iii (1967).

securities, real estate and weights and measures. The Section cooperates with these agencies in the investigation of complaints arising in areas of their responsibility.

The Section has established a close relationship with the Federal Trade Commission through the exchange of legal and factual materials of common interest. This information is limited primarily to the regulation of interstate transactions, but fraudulent operators find it increasingly easy to cross state lines to avoid local prosecution or regulation. This is a situation which necessitates close state and federal cooperation. State officials often find it necessary to enlist the help of the FTC in tracking down mobile operators moving in and out of their areas.

In recent years the FTC has taken an increased interest in state consumer protection programs.⁶ Mr. Gale Gotschall, the FTC Assistant General Counsel for Federal-State Cooperation, admits that the FTC is hard pressed to deal with deceptive practices on the national level and therefore lacks the manpower and resources to deal adequately with local deceptive practices.⁷ An increased interest in local operations is necessary, however, "to nip unfair and deceptive practices in their incipency,"⁸ and prevent them from reaching interstate proportions. In furtherance of this policy, the FTC provides source materials to state agencies drafting consumer legislation.

When the mails are used to defraud, federal postal authorities are a source of valuable help to the Section. The Postmaster General is expressly required to prevent the mails from being used to carry out fraudulent schemes.* The penalty for violation of these statutes is, of course, criminal in nature and the postal fraud statutes reach only flagrantly deceptive practices. However, within the scope of their application, they are very effective. For instance, a fraudulent practice, whereby a businessman is sent an advertisement that is misrepresented as an invoice for his inclusion in a business directory, is now by statute non-mailable matter.**

Because there is a great need for coordination of effort of both private and governmental consumer agencies, the Section is con-

⁶ See Dixon, *Federal-State Cooperation to Combat Unfair Trade Practices*, 39 STATE GOV'T 37 (1966).

⁷ Address by Mr. Gotschall, Western Conference of the National Association of Attorneys General, Sept. 2, 1966.

⁸ Address by Mr. Gotschall, Committee of the Massachusetts General Court, July 10, 1967.

* 39 U.S.C. §§ 4001, 4005 (1964).

** Fed. Rev. and Salary Act of 1967, § 118, 81 Stat. 613.

tinually expanding its cooperative efforts to such organizations as the Federal Communications Commission, the Ohio State University Agricultural Extension Service and the various agencies supplying legal aid services to the poor. Compounding this need for cooperation is the growth of specialized agencies within the various branches of government. The resulting problems include duplication of effort and lack of knowledge of the scope of each agency's activities. It is apparent that, in such a complex governmental system, coordination of effort is a paramount goal in the implementation of worthwhile consumer protection programs.

III. THE COMPLAINT AND INVESTIGATIVE PROCESS

A further source of information, and somewhat of an end in itself to the operation of the Section, is the processing and investigation of complaints about allegedly deceptive practices. Complaints are the chief source of information for the Section, and it is essential for the adjustment of claims and for the preparation for litigation that evidence at this first stage of processing be well documented. Each complaint is therefore reduced to a written report and filed. The topics and the parties involved are filed according to the frequency with which they are the subject of complaints. Among the more common subjects of complaints are chain referral selling, home improvement sales, fly-by-night schools and diploma mills, "bait-and-switch" advertising techniques, false prizes and "lucky drawings," lotteries, and usurious interest rates and carrying charges. Complainants include private individuals, business organizations, state officials and officials of other states, Better Business Bureaus and such federal agencies as the Federal Trade Commission and the Federal Communications Commission. In answer to a questionnaire circulated by the Section, local agencies have expressed a desire to strengthen this reciprocal arrangement through regional conferences which would stress the exchange of pertinent information. Consequently, area meetings are in the planning stage.

After the complaint is received or referred to the Section from one of the various state or federal agencies, it must be evaluated to determine whether the elements of fraud and deception are indicated. If it appears that only a difference of opinion is involved, a representative of the Section describes the functions of the Section to the complainant and suggests that he consider a private attorney.

If the complaint appears to have merit, an investigator interviews the seller to discover the relevant facts of the allegedly fraudu-

lent transaction. The name of the Attorney General must not be used as a club by buyers who are simply disgruntled as the result of a bad bargain. A legitimate businessman may be cowed by the fear of unfavorable publicity resulting from an investigation by the Attorney General's Office. The investigator, therefore, attempts to make it clear that the Attorney General's Office will not take action until the probability of misconduct is established. As a result, contract rescissions and refunds are often made to the mutual satisfaction of buyer and seller.

If a complaint and the seller's response indicate the likelihood of fraudulent or deceptive practices, the Section must seek out an appropriate enforcement authority. Because the Attorney General's Office has only narrow enforcement powers, it is essential that the Section establish a proper rapport with authorities who can deal with the fraudulent seller. The Section does this by indicating its willingness to cooperate with the appropriate authorities in further factual investigation. It is not only essential to establish cooperation with the various enforcement agencies of the state and federal government, but a proper relationship must also be established with local police agencies, since they are often a vital link in the fact gathering process.

IV. USE OF EXISTING GOVERNMENTAL ENFORCEMENT POWERS

If investigation indicates a probability of fraud on a broad scale and informal settlement appears inadequate to serve the public interest, the availability of legal remedies must be ascertained. Because the enforcement authority in the consumer fraud area is vested in agencies on the local, state and federal levels of government, it is necessary to ascertain which agency has the paramount interest in the matter at hand. The results of investigations may then be turned over to the appropriate agency for its unilateral action. However, if the resources of the appropriate agency are taxed by existing problems, as is frequently the situation, for example, in county prosecutors' offices, the cooperation of the Attorney General's Office is sometimes offered.

A. *The Criminal Law as a Tool for Consumer Protection*

In some situations, the county prosecutor in Ohio has the criminal law available to help him protect the public against fraudulent sellers.

Since consumer frauds typically involve some type of fraudulent

or false pretense by which the operator induces the owner to part with his goods, the Ohio larceny statute,⁹ which requires a trespassory taking without the owners consent, is usually not applicable.

The Ohio false pretenses statute¹⁰ applies to the obtaining of anything of value, with intent to defraud, by false pretenses or false statements. This includes the obtaining of a signature under false pretenses. The effectiveness of this statute, especially in the area of consumer frauds and crimes, has been vitiated by judicial holdings that the fraud must relate to a past or present fact or event, not a promise relating to the future. This rule has been squarely applied in Ohio.¹¹ The courts feel this restriction necessary to avoid a flood of prosecutions initiated by victims of bad bargains, and to prevent conviction of those who, in good faith, were simply unable to perform their contractual promises.¹²

If one has obtained title or possession to property by consent, and if such consent was induced by a "false or fraudulent representation, pretense, token or writing," the larceny by trick statute¹³ will apply. This statute is usually used as a sword for defrauded sellers or creditors, and it has been only infrequently applied to protect consumers. In *State v. Singleton*,¹⁴ however, an Ohio Court of Appeals, using the Ohio larceny by trick statute, affirmed the conviction of an unlicensed automobile dealer who promised to deliver new cars in the future after a present payment. The court held that, unlike the crime of false pretenses, larceny by trick did apply to the promise of a future fact, event or transaction. It was further held that giving promissory notes to the victims and the use of innocent salesmen as conduits to make the misrepresentations were not defenses to the complaint, since they were both an integral part of the fraudulent scheme.

The Supreme Court of Ohio has applied the larceny by trick statute to a vendor of real property who intentionally misrep-

⁹ OHIO REV. CODE ANN. § 2907.20 (Page Supp. 1967).

¹⁰ OHIO REV. CODE ANN. § 2911.01 (Page Supp. 1967). The Attorney General is expressly authorized to assist county prosecutors in the prosecution of violators of this section.

¹¹ *Harris v. State*, 125 Ohio St. 257, 181 N.E. 104 (1932); *Horton v. State*, 85 Ohio St. 13, 96 N.E. 797 (1911); *State v. Gibbs*, 9 Ohio N. P. (n.s.) 129 (C. P. Huron 1909), *aff'd*, 82 Ohio St. 456, 92 N.E. 1123 (1910); *Dillingham v. State*, 5 Ohio St. 280 (1855); *See Note, Intent in Larceny by Trick in Ohio*, 3 W. RES. L. REV. 160 (1951); *Pearce, Theft by False Promises*, 101 U. PA. L. REV. 967 (1953).

¹² *See, e.g., Chaplin v. United States*, 157 F.2d 697, 699 (D.C. Cir. 1946).

¹³ OHIO REV. CODE ANN. § 2907.21 (Page Supp. 1967).

¹⁴ 85 Ohio App. 245, 87 N.E.2d 358, *app. denied*, 85 Ohio App. xxxvi (1949).

sented he had good title and did not notify the purchaser that the land was encumbered by a mortgage or that there were delinquent taxes.¹⁵ The court held it was not necessary to prove a specific intent to deprive the purchaser of the purchase price permanently.

False advertising and "bait-and-switch" advertising are now prohibited under Ohio Revised Code section 2911.41, the so-called false advertising statute.¹⁶ The first paragraph of the statute substantially codifies the *Printer's Ink* magazine Model Statute of 1911.

No person, firm, or corporation shall directly or indirectly make, publish, disseminate, circulate, or place before the public, in this state, in a newspaper, magazine, or other publication, or in the form of a book, notice, handbill, poster, circular, pamphlet, letter, sign, placard, card, label, or over any radio station, or in any other way, an advertisement or announcement of any sort regarding merchandise, securities, service, employment, real estate, or anything of value offered by him for use, purchase, or sale, and which advertisement or announcement contains any assertion, representation, or statement which is untrue, or fraudulent.

This portion of the statute has yet to be used to its fullest extent and only one recent case, *State v. Blind Associates Inc.*,¹⁷ has applied the statute. The limited holding in that case was that the false advertising statute applies to telephone solicitations.

Another common fraudulent practice, now expressly prohibited by the second paragraph of the false advertising statute, is the "bait-and-switch" tactic.

No person, firm, or corporation shall, in any manner, or by any means of advertisement, or other means of communication, offer for sale any merchandise, commodity, or service, as part of a plan or scheme with the intent, design, or purpose not to sell

¹⁵ *State v. Healy*, 156 Ohio St. 229, 102 N.E.2d 233 (1951). See also *Kellogg v. State*, 26 Ohio St. 15 (1874); *Miller v. State*, 20 Ohio L. Abs. 408 (Ct. App. 1935); *Eiseman & Landsman v. State*, 12 Ohio L. Abs. 145 (Ct. App. 1932); Note, *Intent in Larceny by Trick in Ohio*, 3 W. RES. L. REV. 160 (1951).

¹⁶ The county prosecutor is given authority to enjoin repeated violations of this statute. OHIO REV. CODE ANN. § 2911.42 (Page 1962). See also Note, *Developments in the Law—Deceptive Advertising*, 80 HARV. L. REV. 1005, 1124-25 (1967). Although there is a conflict in the Ohio case law, the better view, from the standpoint of consumer frauds, is that an intent to deceive need not be proved. See *State v. Schaengold*, 13 Ohio L. Rep. 130 (Mun. Ct. 1915); *Straum v. State*, 15 Ohio App. 32 (1921) (dictum). *Contra*, *Rosenblatt v. Cleveland*, 20 Ohio L. Abs. 106 (Ct. App. 1935). Cf. *State v. Lubell*, 28 Ohio N. P. (n.s.) 155 (Toledo Mun. Ct. 1930). See cases collected in Note, *The Regulation of Advertising*, 56 COLUM. L. REV. 1018, 1058-1065 (1956).

¹⁷ 4 Ohio Misc. 129, 217 N.E.2d 43 (C. P. Lake 1965).

the merchandise, commodity, or service so advertised at the price stated therein, or with the intent, design, or purpose not to sell the merchandise, commodity, or service so advertised.

An attractive price is used to entice the customer to the seller's place of business. Once there, the customer is told, or finds out, that the advertised product is inferior and the salesman "switches" him to a higher priced product which is represented as a better deal. Despite the widespread use of such a tactic, there has been little enforcement of this portion of the statute. The basic reason for this is the difficulty involved in prosecution of the offense. First, the statute does not apply to good faith broadcasters or publishers through whom most of the bait-and-switch tactics are used. Second, the intent to deceive must be proved. The effect of the latter requirement is to bring about an almost insurmountable problem of proof of facts necessary to constitute the offense.

Thus, the main criminal law tools available in Ohio to protect the consumer¹⁸ at best reach only the more flagrant types of consumer frauds and deceptions. Even when they are applicable, local officials often are not able to enforce these statutes because their resources are taken up by other problems.¹⁹ It is therefore apparent that the criminal law alone can never be the mainstay of a comprehensive consumer protection program.

B. *Intervention in Civil Cases Involving a Public Interest*

The use of amicus curiae briefs by the Office of the Attorney General can be very effective when a statute of widespread interest to the consumer is at issue. The amount of money involved in each case, however, is usually so small that the consumer himself does not feel that full-scale litigation is warranted. As a result, the Office of the Attorney General has filed amicus curiae briefs on behalf of the consumer parties in only two cases. In *Fairfax Family Fund, Inc. v. Swartout*²⁰ an amicus brief was filed on behalf of a defendant who

¹⁸ In addition to these better known criminal statutes, the Ohio Revised Code also proscribes other lesser known frauds which may be used to defraud consumers. The sending of letters or instruments with the intent to defraud is expressly prohibited. OHIO REV. CODE ANN. § 2911.34 (Page 1962). The Code provides comprehensive protection for investors against fraudulent stock brokers. OHIO REV. CODE ANN. §§ 2911.04-10 (Page 1962). Other types of frauds which are of limited public interest are also prohibited under OHIO REV. CODE ANN. §§ 2911.01-42 (Page 1962).

¹⁹ See generally Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 718-719 n.59 (1967).

²⁰ Case No. 10,107 (Cuyahoga Falls Mun. Ct. 1964).

had obtained a loan from a foreign corporation which had not obtained a license from the Ohio Division of Securities. The effect of the Attorney General's arguments cannot be tested since the judgment for the defendant rested on bankruptcy grounds. In *Yoder v. So-Soft of Ohio, Inc.*,²¹ however, the court adopted the contention of the Attorney General that a referral sales agreement was a security within Ohio Revised Code section 1707.01.

Certainly the true effectiveness of *amicus curiae* briefs has yet to be tested. The Office of the Attorney General can, however, have a very great impact in cases involving consumer frauds and crimes. The Consumer Frauds and Crimes Section has the advantage of the accumulation of a great body of knowledge in this area, not only from state, local and private organizations but from such federal agencies as the Federal Trade Commission. The use of the expertise of the Section in *amicus* briefs is not only a help to counsel for the consumer, but it also gives the court a better understanding of the widespread fraudulent practices involved and demonstrates the need for an effective remedy.

C. *The Powers of the Federal Trade Commission*

If the Section receives evidence that the channels of interstate commerce are being used by fraudulent operators, the enforcement powers of the FTC may be available. Under section 5(b) of the Federal Trade Commission Act, the FTC has the power to reach "unfair or deceptive acts or practices in commerce."²² The FTC has broad enabling power to deal with the various plans and schemes used by all types of fraudulent operators.

The main enforcement sanction presently employed by the FTC is the cease and desist order. This order is issued after the filing of a formal complaint, a hearing thereon and a determination that an unfair or deceptive practice is being used.²³ The party against whom the order is issued has the right of appeal to the United States Courts of Appeal. After or absent an appeal the order becomes final and civil penalties of up to 5,000 dollars per day of violations can

²¹ 94 Ohio L. Abs. 353, 202 N.E.2d 329 (C. P. Stark 1963). It should be noted, however, that this holding was rejected in *Emery v. So-Soft of Ohio, Inc.*, 94 Ohio L. Abs. 357, 199 N.E.2d 120 (Ct. App. 1964), in which the Attorney General's Office did not file a brief. *Contra*, *Commonwealth v. Allen*, 404 S.W.2d 464 (Ky. 1966); *Sherwood & Roberts—Yakima, Inc. v. Leach*, 67 Wash. 2d 630, 409 P.2d 160 (1965).

²² 15 U.S.C. § 45(a)(1) (1964).

²³ 15 U.S.C. § 45(b) (1964).

be recovered by the FTC in a civil action.²⁴ At present the FTC is seeking the broadened authority to obtain court orders to stop deceptive practices pending the issuance of the complaint.²⁵ Such a power would give the FTC the very great advantage of reaching those operators who often flee before the FTC makes its determination of deception.

Despite its broad statutory authority and powers of enforcement, there are limitations on the usefulness of the FTC to state and local officials. The FTC cannot reach practices which only "affect" intrastate commerce.²⁶ Added to this is the unwillingness which has been indicated by the FTC to reach deceptive practices of an essentially local nature.²⁷ The FTC wishes to retain its present policy of referral of complaints to state and local agencies, lending of legal aid to law enforcement bodies, and distribution of pamphlets and booklets as a part of the drive for consumer education. The value of these functions of the FTC, however, cannot be understated. The FTC has become a body for the receipt and dispersal of all kinds of consumer information. As mentioned previously, it relays to the state agencies such things as the latest decisions in the consumer area and suggested disposition on different aspects of consumer frauds—information which is mainly local in character. Thus, while the cease and desist order of the FTC has not become a panacea for the local official, the informational function of the FTC has been an invaluable aid.

V. EDUCATION AND INFORMATION FUNCTIONS OF THE SECTION

Americans have tended to regard themselves as producers rather than as consumers. Businessmen, workingmen, and others have long organized themselves to protect their rights to produce and to reap the profits of production. But few Americans ever consider the consequences of undisciplined consumption. Americans were formerly held in check not only by a moral code that stressed thrift and frugality, but also by the inherent limitations of the national economy. Today, the general availability of credit, coupled with the

²⁴ 15 U.S.C. § 45(1) (1964).

²⁵ S. 3065, 90th Cong., 2d Sess. (1968).

²⁶ *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1941). See generally Note, *Jurisdictional Fetter on the FTC*, 76 YALE L.J. 1688 (1967). Note, however, that S. 3066, 90th Cong., 2d Sess. (1968), if enacted, would overrule the *Bunte Bros.* case. See also, 15 U.S.C. § 45(b) which indicates that even if a practice is in interstate commerce, a substantial public interest must be involved before the FTC can issue a complaint.

²⁷ Dixon, *supra* note 6, at 38-39.

more liberal attitude toward consumption and the tremendous growth of the gross national product, has turned America into a predominantly consumer nation. Keeping up with the Joneses does not mean making as much money as the Joneses do, but having the same kind of house, television, etc. Consumers find bargains attractive because they are driven by the contemporary mores of our society to consume and acquire goods. As a result the opportunities for fraud and deception are abundant.

It is the view of the Consumer Frauds and Crimes Section that the answer to this problem does not lie in governmental regulation of the consumer. Rather, the role of government should be the education of the consumer. If the processes of education can be used to achieve the desirable goals in the consumer area, they are superior to the use of legal deterrents. The Section realizes that one of the basic reasons for the widespread use of fraudulent and deceptive practices is the gullibility and naivety of the consumer. It is therefore one of the basic purposes of the Section to give the consumer sufficient sophistication to understand and recognize the various types of fraud and deception with which he may come into contact.

For these reasons the second major function of the Consumer Frauds and Crimes Section (the first being the coordination of law enforcement agencies) becomes one of education of the consumer. The purpose of the consumer education program, however, is not to preempt public and private programs working in this area. The Section works under the assumption that the consumer needs all the education he can possibly receive. Because the Section is a state created agency, it is able to reach larger segments of the public, not only through newspaper, radio and television coverage, but also through its official contacts with local authorities. The Section then cooperates with other consumer agencies to disseminate as much information as possible.

The standard vehicle of information is the Consumer Frauds and Crimes Bulletin which is issued twice a month to such agencies as local prosecutors, police agencies, libraries, Better Business Bureaus, Chambers of Commerce and retail merchants. The Bulletin contains factual information dealing with current fraudulent and deceptive practices and discusses legal developments of interest to the consumer. It is written on the consumer's level so that he may better understand the techniques used by fraudulent operators.

Certainly a basic purpose of the information is to help the consumer defend himself against these practices, but there is also an

enforcement aspect to the Bulletin. If the consumer can recognize the basic technique involved in, for example, chain referral selling or "bait-and-switch" advertising, he is able not only to guard against them, but also to report them to the Consumer Frauds and Crimes Section or one of the local public or private consumer agencies. Since complaints are the basic source of information for the Section, this public awareness of the problem is essential.

VI. REVIEW AND CONSIDERATION OF LEGISLATION AFFECTING CONSUMERS

Since Ohio is in the formative stages in the creation of a workable consumer frauds and crimes program, the most important function of the Section at the present time is its role in the process of consideration and adoption of consumer legislation. The Section receives a great volume of legislative information from a variety of sources, such as the FTC and the National Commissioners on Uniform State Laws. Through its official contacts the Section is also able to focus on the great body of recorded experience with consumer protection programs of other states. Members of the staff are available to evaluate specific legislative proposals before the Ohio General Assembly and provide legislators with a comparative study of these proposals. It is the function of the staff in this area to testify before the Committees of the General Assembly as to proposed legislation, to receive and comment upon bills before the Congress that are of interest to the consumer and to review the variety of state consumer legislation which the Section receives. The Section was activated to achieve a coordinated consumer protection program in Ohio. Because of the great body of information necessary for an effective comparative approach to consumer problems, it is an appropriate forum for the review and evaluation of proposed consumer legislation.

A comparative study of legislation and an analysis of the effectiveness of that legislation indicates that the consumer frauds and crimes problem is becoming one of increasing concern. There is a general consensus that the law in many states is inadequate to achieve comprehensive consumer protection. The criminal law is not an appropriate tool to achieve broad social policy goals. It necessitates proof of the impossible requirements of scienter, proof beyond a reasonable doubt, penalties and fines that may be deemed only a cost of doing business, and strict construction and application of statutes by judges and juries. Further, the deceptive practice will

have resulted in an injury to the public before a criminal sanction can be invoked. This inadequacy of legal protection for the consumer is also evidenced in the use of civil remedies for protection against deceptive practices. The experience of the Section has shown that a private remedy will not be invoked unless a plaintiff has suffered substantial injury. As a result, many deceptive practices seek to defraud the individual consumer out of comparatively small sums, and the profit is derived from reaching a large number of individuals. Even if a party does find it worthwhile to obtain a judgment, the seller may flee the jurisdiction or lack the assets to pay. Many fraudulent operators are also able to write off periodic judgments as a cost of doing business.

It is apparent that more flexible remedies must be available to stop the deceptive practice before substantial injury is done to the consumer. The efforts of private and governmental organizations to warn the public about deceptive practices are absolutely necessary, but an approach which merely recognizes existing fraudulent practice and seeks to educate the consumer is not enough. The main goal of law enforcement should be the elimination of deceptive practices.

Professor Richard J. Barber adopts a comprehensive solution and, while his suggestions point mainly to federal consumer programs, there would seem to be no reason why his ideas cannot be effected at the state level.²⁸ Professor Barber claims that those who advocate that misrepresentation and deception are the real sin of advertising actually miss the issue at stake. Legislation should be enacted that would make more pertinent information available to the consumer by requiring the producer to disclose the information necessary to enable the consumer to make an informed choice.²⁹ The consumer lacks such information as the price of the products, the ". . . contents, quality and the relative merits of one brand as compared with another of the same general type."³⁰

Given this need, however, the question becomes: can this information be made available to the consumer in terms which he can understand? From this point of view Professor Barber's ideas do not provide a panacea for the consumer protection problem. The relevant technological, medical and economic issues involved in the

²⁸ Barber, *Consumer Protection and Federal Legislation*, 1967 N.Y. STATE BAR ASS'N ANTITRUST L. SYM. 74. Professor Barber is currently Special Counsel for the United States Senate Subcommittee on Antitrust and Monopoly.

²⁹ *Id.* This is essentially the approach of the Fair Packaging and Labelling Act of 1966. 15 U.S.C. §§ 1451-1461 (Supp. 1967).

³⁰ *Id.* at 77.

marketing of products are highly complex. If the past is any guide to the future, one can be sure that not only will contemporary knowledge of the consumer be proved inadequate, but in some cases incorrect and dangerous.³¹ Due to the complexity of the problem involved, can the legislature or an administrative agency obtain the knowledge to lay down relevant and adequate guidelines for pertinent disclosure? A possible alternative might be to enact legislation requiring disclosure in broad terms and putting the burden of keeping abreast of current developments on the producer. Appropriate civil remedies could then be made available to insure the use of due care in disclosure on the part of the producer.

Another approach to the consumer protection problem, which has been widely accepted, as evidenced by recent legislation and various legislative proposals, is first, to provide a broad definition of unfair or deceptive trade practices and, second, to invest the State Attorney General with broad and flexible powers to enjoin such deceptive practices.³² Following this pattern, Washington, Hawaii, Vermont and Massachusetts have enacted statutes substantially similar to section 5 of the Federal Trade Commission Act. These statutes declare unlawful "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce"³³ and also give the state attorney general broad injunctive powers, the power to accept assurances of discontinuance and broad investigative powers upon the issuance of a civil investigative demand or complaint. This broad definition of deception not only has the advantage of being able to deal with the many new and different types of deceptive practices which may arise, but also enables the state to employ the established body of FTC case law in the interpretation of its statutes.³⁴

Many other consumer legislation programs have been proposed and many have been enacted by various states. The Council on State

31 See Turner, *Advertising and Competition*, 26 FED. B.J. 93, 96-97 (1966).

32 See, e.g., 26 SUGG. ST. LEG. A-71 (1967); UNIFORM CONSUMER PROTECTION ACT, Working Draft No. 2 (1967); Lefkowitz, *Consumer Protection by State Legislation*, 1967 N.Y. BAR ASS'N ANTITRUST L. SYM. 81; Note, *State Consumer Protection: A Proposal*, 53 IOWA L. REV. 710, 716 (1967).

33 HAWAII REV. LAWS § 205A-1.1 (Supp. 1965); MASS. ANN. LAWS Ch. 93A (1967); VT. STATS. ANN. tit. 9, §§ 2451-2462 (Supp. 1968); WASH. REV. CODE ANN. § 19.86.020 (Supp. 1967).

34 See generally, REPORT OF THE COMM. ON N. Y. STATE ANTITRUST LAW OF THE ANTITRUST LAW SECTION OF THE N.Y. STATE BAR ASS'N 11-12 (1967); O'Connell, *supra* note 4, at 234.

Governments has recommended passage of statutes similar to the Unfair Trade Practices and Consumers Protection Law.³⁵ However, the Council struck out the broad definition of deceptive practices of section 5 of the Federal Trade Commission Act and substituted the twelve specific prohibitions of the Uniform Deceptive Trade Practices Act of 1964.³⁶ The basic problem with the Council's proposal, however, is that these specific prohibitions do "... not have the flexibility of Section five . . . of the Federal Trade Commission Act . . . in dealing with new and varied forms which consumer deception may take."³⁷

The most recent and advanced state consumer protection legis-

³⁵ 26 SUGG. ST. LEG. A-71 (1967). See also *Consumer Protection Symposium*, 29 OHIO ST. L.J. 593 (1968), for extensive discussion of the proposed Uniform Consumer Credit Code.

³⁶ 26 SUGG. ST. LEG. A-71:

'Unfair methods of competition and unfair or deceptive acts or practices' means any one or more of the following:

- (1) passing off goods or services as those of another;
- (2) causing likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (3) causing likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another;
- (4) using deceptive representations or designations of geographic origin in connection with goods or services;
- (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;
- (6) representing that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;
- (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (8) disparaging the goods, services, or business of another by false or misleading representation of fact;
- (9) advertising goods or services with intent not to sell them as advertised;
- (10) advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;
- (11) making false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or
- (12) engaging in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

³⁷ Report, *supra* note 34, at 11.

lation is the Illinois Consumer Fraud Act, which was amended effective January 1, 1968.³⁸ The Act declares unlawful

[a]ny deception, fraud, false pretenses, false promise, misrepresentation, or the concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission in connection with the sale or advertisement of any merchandise, whether or not any person has in fact been misled, deceived or damaged thereby.

The Act also specifically declares chain referral sales techniques unlawful if the sale price is over 300 dollars³⁹ and provides a three day "cooling off" period for buyers from door-to-door sellers, during which time the buyer can rescind if the sale price is over fifty dollars.⁴⁰ The Act further provides that there must be notice given to the maker of a negotiable note that he has five days after delivery of the goods to assert any defenses against any holder of the note, which is a significant inroad on the abuses engendered by the holder in due course concept in deceptive commercial practices.⁴¹ The Act also contains provisions relating to dunning by merchants, provisions in automobile warranties, repossession of goods and "bank financing" advertising.⁴² These powers are in addition to statutory authority given the Attorney General to deal with deceptive practices. The basic difficulty with this Illinois statute, however, and perhaps the only procedural flaw in many comprehensive consumer legislation programs is the failure to provide the attorney general with the power to obtain a temporary or preliminary injunction similar to the temporary cease and desist order available to the FTC.⁴³ This is

³⁸ ILL. ANN. STATS. ch. 121-1/2, §§ 261-271 (Supp. 1967). Missouri has adopted a statute similar to the Illinois statute. The Missouri statute does not deal with specific consumer fraud abuses. MO. ANN. STAT. §§ 407.010-.130 (Supp. 1967). It does, however, go further than the Illinois Statute by empowering the attorney general to investigate complaints, obtain voluntary compliance and enjoin deceptive practices.

³⁹ ILL. ANN. STATS. ch. 121-1/2, § 262A (Supp. 1967).

⁴⁰ ILL. ANN. STATS. ch. 121-1/2, § 262B (Supp. 1967); S. 1599, 90th Cong., 2d Sess. (1967) provides a cooling off period of one day. This bill is superior to the Illinois statute in that notice of the right to rescind must be given the buyer. *See* Wall Street Journal, March 6, 1968, at 6, col. 3 (Midwest ed.). (Statement by Paul R. Dixon, Chairman, FTC.)

⁴¹ ILL. ANN. STATS. ch. 121-1/2, § 262D (Supp. 1967).

⁴² ILL. ANN. STATS. ch. 121-1/2, §§ 262E-262L (Supp. 1967); *See generally* Rock, *Credit Reform in Illinois . . . The Age of Consumerism*, 49 CHICAGO B. REC. 91 (1967); Legis. Note, *New Consumer Credit Reforms in Illinois*, 17 DE PAUL L. REV. 194 (1967).

⁴³ S. 3065, 90th Cong., 2d Sess. (1968). *See* text accompanying note 25, *supra*.

a highly desirable tool of enforcement and an effective way to take the profit out of deceptive practices.⁴⁴

The current draft of the Uniform Consumer Protection Act⁴⁵ is comparable to the Illinois and Missouri Acts.⁴⁶ Section Two simply states, "... deceptive acts or practices in the conduct of any business are unlawful." The draft provides for broad discovery procedures and allows the attorney general to obtain an injunction or a declaratory judgment for a private class. It also allows the attorney general to accept assurances of voluntary compliance and render advisory opinions on the lawfulness of particular conduct. The sanctions of the draft do not apply to those who are acting in conformity with the statutes, orders or rules of another state or the federal government, nor do they apply to good faith broadcasters and publishers.

A further legislative technique that can be used for consumer protection, particularly in the area of practices known as fly-by-night schools and diploma mills, is licensing. Many such deceptive schemes are carried out under the guise that the operator possesses special expertise. In an age that puts so much faith in education, many people are duped into believing that a variety of private schools can teach them the special skills necessary for employment in this competitive world. If standards for schools offering to teach special skills were formulated and licenses required, not only would the students be protected, but also legitimate operators of such schools would achieve the success they deserve. An additional requirement of bonding would also help to ensure the financial responsibility of the operators of such schools.

Two other common fraudulent practices have been given special legislative study. One is the referral sales contract technique. Under this type of contract the seller induces the buyer into accepting goods by telling him that he may refer new customers to the seller and receive a share of the profits from the new sales. In this manner the buyer accepts an overcharge on goods in the unjustified hope that he will more than make up the difference through his profits from referrals. The legislative draftsman is presented with the choice of whether to totally outlaw such agreements through

⁴⁴ Dixon, *R= for Consumer Protection—"Hard" and "Fair" Competition*, 1967 N.Y. BAR ASS'N ANTITRUST LAW SYM. 47, 51-52; See S. 3065, 90th Cong., 2d Sess. (1968).

⁴⁵ National Conference of Commissioners on Uniform State Laws, Working Draft No. 2 (1967).

⁴⁶ See note 38 *supra* and accompanying text.

special legislation⁴⁷ or to seek to cover referral sales in more general legislation banning deceptive practices.

Door-to-door selling techniques also cause much concern in Ohio. A "cooling off" period of several days during which the buyer could rescind and a requirement that the buyer be given written notice of that right by the seller, appears to be the proper approach to specific legislation, but again, the question is whether more general language, such as the unconscionable contract clause of section 2-302 of the Uniform Commercial Code, is more desirable. The greatest difficulty for the draftsmen of legislation dealing with such deceptive practices as door-to-door selling or referral sales is that in seeking to protect the consumer against specific abuses, instead of bringing all abuses within a broad definition of deception, they may always remain one step behind the ingenuity of the fraudulent seller.

The Section is concerned not only with the evaluation of appropriate legislation, but also with the issue of what purpose is to be served by the enactment of consumer legislation. The protection of the consumer should not be the only goal; for also in issue is the protection of the free enterprise system. Free enterprise serves the political purpose of diffusing economic power. Its primary economic benefit is to the consumer. As Adam Smith wrote in 1776, "Consumption is the sole end and purpose of all production; and the interests of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer."⁴⁸ The role of the government then is to provide a balance between buyer and seller. In no other way can the free enterprise system survive.

Consumer protection is not the exclusive province of government. The legislative proposals of the Consumer Frauds and Crimes Section are only tentative suggestions for future action in Ohio, and the Section is receptive to suggestion and rational argument. It has received many helpful suggestions from private lawyers who have taken an interest in legal developments in the field of consumer protection. A good example of very fruitful work outside of government is the reports of the Antitrust Section of the New York State Bar Association.⁴⁹ These are reasoned attempts to discover the

⁴⁷ See, e.g., ILL. ANN. STATS. ch. 121-1/2 §§ 261-271 (Supp. 1967).

⁴⁸ A. SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 625 (Modern Library Ed. 1937). See also Barber, *Government and the Consumer*, 64 MICH. L. REV. 1203 (1966).

⁴⁹ FIRST REPORT OF THE SPECIAL COMMITTEE OF THE ANTITRUST SECTION OF THE

proper legal response to an age of mass consumption. Hopefully, more lawyers will participate in this effort to achieve comprehensive consumer protection.

VII. CONCLUSION

Consumer protection is rapidly expanding into a new and immensely complex field of law. Although in recent years Ohio has begun to make significant advances in consumer protection, much remains to be done. The possibilities for legislation are many and varied. The advantages and disadvantages of each approach, as evidenced not only by specific legislation but also by the effectiveness of that legislation in practice, must be thoroughly studied by the entire legal profession. Efforts must be accelerated to amass the factual data necessary to cope with the rising tide of consumer deceptions. The many private and governmental agencies must be coordinated and their efforts concentrated on deceptive operators who take millions of dollars each year from the public. In other words, the task of the Consumer Frauds and Crimes Section of the Office of the Attorney General has just begun.

NEW YORK STATE BAR ASS'N TO STUDY THE ANTITRUST LAWS OF NEW YORK (1957); SECOND REPORT OF THE SPECIAL COMMITTEE OF THE ANTITRUST SECTION OF THE NEW YORK STATE BAR ASS'N TO STUDY THE ANTITRUST LAWS OF NEW YORK (1959); 1967 NEW YORK STATE BAR ASS'N ANTITRUST LAW SYM.; REPORT OF THE COMMITTEE ON NEW YORK STATE ANTITRUST LAW OF THE ANTITRUST LAW SECTION OF THE NEW YORK STATE BAR ASS'N: A PROPOSED NEW STATE LAW MAKING DECEPTIVE ACTS OR PRACTICES UNLAWFUL (1967).